

## Message Text

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TO AMEMBASSY BONN

USMISSION USBERLIN

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C O N F I D E N T I A L STATE 042292

E.O. 11652: GDS

TAGS: AFSP, AINF, GW, WB, AKB

SUBJECT: STATUS OF U.S. CITIZENS IN LOCAL NATIONAL  
POSITIONS ADMINISTERED BY U.S. FORCES IN BERLIN: ARE THEY  
U.S. GOVERNMENT EMPLOYEES? AND TAX LIABILITY OF PERSONS  
EMPLOYED BY NON-APPROPRIATED FUND ACTIVITIES IN FRG

REF: USBER 207 AND PREVIOUS

.. DEPT REPRESENTATIVES FROM L AND EUR/CE AND BERLIN  
MISSION LEGAL ADVISER MET WITH REPRESENTATIVES OF DOD,  
TREASURY AND IRS ON JANUARY 31, 1978 TO DISCUSS QUESTION  
OF WHETHER U.S. CITIZENS IN LOCAL NATIONAL POSITIONS AD-  
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MINISTERED BY US FORCES IN BERLIN ARE USG EMPLOYEES WITHIN  
MEANING OF TAX CODE. (NOTE: RELATED QUESTION OF TAXATION  
OF NON-APPROPRIATED FUND EMPLOYEES IN FRG WAS NOT DISCUSSED  
IN DETAIL AND WILL BE TAKEN UP AT A LATER TIME.) MISSION  
LEGAL ADVISER DISCUSSED LEGAL ARGUMENT MADE REFTEL THAT  
ALLIED KOMMANDATURA (AK) AND NOT USG IS EMPLOYER OF THESE  
PERSONNEL. DOD SUPPORTED THIS POSITION. MISSION LEGAL

ADVISER ALSO OUTLINED CONSEQUENCES THAT WOULD FLOW FROM ADVERSE DETERMINATION AS SET FORTH REFTEL, AND EMPHASIZED NECESSITY OF CONSULTING WITH FRG AND IN AK PRIOR TO ANY IMPLEMENTATION OF A US DECISION (FOR TAX PURPOSES) THAT SUCH PERSONNEL ARE USG EMPLOYEES.

2. IRS REPRESENTATIVES, INCLUDING BONN IRS ATTACHE WALLACE SPENCER, DID NOT CONTEST THAT AK HAS ULTIMATE AUTHORITY FOR EMPLOYMENT OF PERSONNEL IN LN POSITIONS IN BERLIN. THEY CONSIDER, HOWEVER, THAT AK HAS DELEGATED MUCH OF THIS AUTHORITY TO US (BRITISH OR FRENCH) FORCES. ACCORDINGLY THEY ARE AT THIS TIME NOT CONVINCED THAT UNDER INTERNAL REVENUE CODE ANYONE OTHER THAN USG OR ITS INSTRUMENTALITIES SHOULD BE CONSIDERED TO BE THE EMPLOYER WHERE USG AGENCIES HAVE HIRING AUTHORITY AND DAY-TO-DAY SUPERVISION OVER WORK OF EMPLOYEES. HOWEVER, IRS HAS NOT REPEAT NOT MADE FINAL DECISION FROM ITS POINT OF VIEW ON WHO IS EMPLOYER.

3. DEPT REPRESENTATIVES POINTED OUT THAT A NUMBER OF IMPORTANT ISSUES WOULD ARISE AS A RESULT OF SUCH A DECISION, AND THAT THE RESOLUTIONS OF THOSE ISSUES WOULD DETERMINE THE EXTENT OF THE POLITICAL, LEGAL AND POLICY CONSEQUENCES WHICH WOULD RESULT FROM SUCH A DECISION. THOSE RESOLUTIONS WOULD ALSO PROVIDE THE US AUTHORITIES IN BERLIN WITH A MEANS TO EVALUATE WHETHER SUCH A DECISION COULD BE IMPLEMENTED.

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MENTED UNILATERALLY IN BERLIN BY THE US (AFTER APPROPRIATE CONSULTATIONS) OR WHETHER FORMAL APPROVAL OF THE AK WOULD BE NECESSARY TO GIVE EFFECT TO CERTAIN MEASURES NECESSARY FOR IMPLEMENTATION. DEPT REPRESENTATIVES ARGUED THAT THEREFORE IT WAS ESSENTIAL TO EXAMINE THOROUGHLY AND PRIOR TO A DECISION THE CONSEQUENCES (OUTLINED REFTEL) OF THE DECISION. IRS WAS ADVISED THAT BOTH THE AMBASSADOR IN BONN AND MINISTER IN BERLIN HAVE EXPRESSED CONCERN WITH THE LIKELY IMPACT OF SUCH CONSEQUENCES ON RELATIONS WITH THE FRG AND IN BERLIN.

4. THE IRS REPRESENTATIVES STATED THAT SUCH WERE POLICY MATTERS OUTSIDE THEIR BAILIWICK. THEY CONSIDER ISSUE TO BE PURELY ONE OF TAX ADMINISTRATION RATHER THAN POLICY. DEPT REPRESENTATIVES SUGGESTED THAT THE SUBJECT MATTER BE CONSIDERED AT A LEVEL IN THE TREASURY DEPT IN WHICH THE BROADER ISSUES COULD BE EXAMINED. TREASURY ALSO EXPRESSED THE VIEW THAT AT THIS POINT THE ISSUE WAS ONE OF TAX ADMINISTRATION, NOT POLICY. MOREOVER, THEY INDICATE THAT SINCE THE IRS HAD NOT FINALIZED ITS POSITION, THE POLICY ISSUES WHICH DEAL PRINCIPALLY WITH U.S. RELATIONS WITH THE FRG WERE NOT RIPE FOR RESOLUTION; AND THAT EVEN IF

RIPE, THE POLICY ISSUES DID NOT SEEM TO PRESENT TAX POLICY CONSIDERATIONS WARRANTING TREASURY INVOLVEMENT. IRS REPRESENTATIVES STATED THAT THEIR DETERMINATION HAS BEEN DELAYED BECAUSE IRS BONN ATTACHE SPENCER STILL LACKS CERTAIN DOCUMENTATION WHICH HE CONSIDERS NECESSARY FOR HIS EXAMINATION.

5. SPENCER SEEKS MORE INFORMATION BEARING ON THE DECISION, INCLUDING DOCUMENTATION IN SUPPORT OF POSITION ADVANCED BY BONN AND BERLIN. DEPT AND DOD REPRESENTATIVES AGREED TO FACILITATE HIS ACCESS TO APPROPRIATE INFORMATION. ONCE IRS ARRIVES AT INTERNAL DECISION, AN INTER-AGENCY REVIEW OF THAT DECISION WILL FOLLOW TO ARRIVE AT AGREED USG POSITION.  
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6. APART FROM THE MERITS OF THE LEGAL ARGUMENT, IRS HAS TWO IMMEDIATE CONCERNS. FIRST, THEIR TAXPAYER ASSISTERS IN BERLIN NEED BE ABLE TO ANSWER US TAXPAYER INQUIRIES ON THE REPORTABILITY AND/OR EXCLUDABILITY OF INCOME EARNED IN LOCAL NATIONAL POSITIONS. TO MEET THIS CONCERN, DEPT AND DOD WILL SEEK TO WORK OUT WITH IRS AN AGREED STATEMENT FOR DISTRIBUTION TO TAXPAYERS WHO INQUIRE ABOUT THEIR STATUS. IN ORDER TO SATISFY BOTH THE IRS AND THE DEPT, STATEMENT WILL HAVE TO AVOID TAKING A DEFINITIVE US POSITION ON HOW THE INTER-AGENCY DISPUTE WILL BE RESOLVED.

7. SECOND IRS CONCERN IS THAT THE STATUTE OF LIMITATIONS ON 1974 RETURNS WILL RUN OUT APRIL 15 OF THIS YEAR. AS THEY SEE IT, THEIR CHOICES ARE (1) TO MAKE AN IMMEDIATE ASSESSMENT OF TAXES (WHILE POSTPONING COLLECTION PENDING RESOLUTION OF DISPUTE); OR (2) TO SECURE AN EXTENSION OF THE STATUTE OF LIMITATIONS FROM THE USG AS EMPLOYER UNDER THEIR THEORY. ALTERNATIVE (1) IS CLEARLY UNACCEPTABLE FROM OUR POINT OF VIEW SINCE IT WOULD CREATE POLITICAL FRICTION WITH THE FRG AND ALLIES DUE TO USG FAILURE TO CONSULT WITH THEM IN ADVANCE. ALTERNATIVE (2) WOULD BUY MORE TIME FOR REASONED CONSIDERATION OF THE PROBLEM. IRS WILL NOT REPEAT NOT AGREE TO ANY COURSE THAT WOULD LET THE STATUTE OF LIMITATIONS EXPIRE.

8. IRS HAS AGREED THA- IF ALTERNATIVE (2) IS ADOPTED, CONSENT FROM THE APPROPRIATE USG OFFICIAL TO EXTENSION OF THE STATUTE OF LIMITATION ON COLLECTION OF THE EMPLOYER'S SHARE OF THE TAXES IS ALL THAT IS REQUIRED. IT IS CLEARLY UNDERSTOOD THAT THE EXTENSION WILL BE WITHOUT PREJUDICE TO EITHER SIDE'S LEGAL POSITION.

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9. AGREED TAXPAYER ASSISTANCE LANGUAGE WILL BE CABLED AS SOON AS TEXT IS PREPARED.

10. BONN AND BERLIN SHOULD CONTINUE TO MARSHAL ALL EVIDENCE AND LEGAL ARGUMENTS IN SUPPORT OF OUR POSITION, AND SHOULD FACILITATE ACCESS BY SPENCER TO INFORMATION PERTINENT TO THE IRS'S TAX INVESTIGATION.

11. ACTION REQUESTED BERLIN: ADMINISTRATIVE OFFICER

INSTRUCTED TO SIGN IRS FORM SS-10 (CONSENT TO FIX PERIOD OF LIMITATION ON ASSESSMENT OF EMPLOYMENT TAXES) WITH RESPECT TO THOSE USG CITIZENS CONTRACTED BY USBER AND PAID BY OCCUPATION COST FUNDS.

12.A. ACTION REQUESTED BONN: COUNSELOR FOR ADMINISTRATION REQUESTED PERFORM SAME ACTION INDICATED PARA 11, CONCERNING PERSONS EMPLOYED BY NON-APPROPRIATED FUND ACTIVITIES RELATED TO OR AUTHORIZED BY THE EMBASSY.

12.B. AMERICAN EMPLOYEES ASSOCIATION (AEA) SHOULD BE REQUESTED BY EMBASSY TO DISCLOSE RELEVANT INFORMATION UPON REQUEST BY IRS REPRESENTATIVE SPENCER, INCLUDING EMPLOYEE NAMES, PAYROLL RECORDS, SOCIAL SECURITY NUMBERS, AND OTHER PERTINENT PAYEE INFORMATION.

13. FOR BONN AND BERLIN: ADD TO FORM SS-10 FOLLOWING STATEMENT: "THE SIGNATURE HEREUNDER SHALL NOT BE CONSTRUED AS CONCURRENCE BY ANY AGENCY OF GOVERNMENT REPRESENTED BY THE SIGNATORY THAT SUCH AGENCY IS AUTHORIZED TO OR IN FACT HAS ACTED IN THE CAPACITY OF AN EMPLOYER WITH RESPECT TO ANY PERSONS AFFECTED HEREBY." VANCE

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